STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ANDREW KLINKHAMMER,
a Minor, by his Mother and Next Friend,
CONSTANCE KLINKHAMMER,

Plaintiffs,

Case No. 2004-4083-NO

vs.

VILLA MANOR APARTMENTS, LLC,

Defendant.
_____/

OPINION AND ORDER

Defendant filed a Motion in Limine Summary Disposition under MCR 2.116(C)(10).

On September 22, 2003, minor plaintiff was injured when playing on a teeter-totter on the defendant's premises. Plaintiff maintains that defendant was negligent in not maintaining a minimum of 6 inches of protective material underneath the teeter-totter to prevent or minimize injuries in the event a child should fall from the playground equipment. Plaintiff relies on the opinion and testimony of a selected liability expert, Scott Burton. Defendant now moves to strike any testimony or evidence of said expert on the basis that his opinion is based upon certain safety manuals for application to public entities, not private entities such as defendant's apartment complex premises, and as such, are inapplicable to the instant case. This being the case, defendant requests dismissal of plaintiff's case in light of the fact that without said testimony, plaintiff cannot respond to defendant's open and obvious argument without relying upon speculation and/or conjecture.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, and the disputed actual issue must be material to the dispositive legal claims. *State Farm v Johnson,* 187 Mich App 264,267; 466 NW2d 287 (1990). The Court must consider all pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Corley supra* at 278.

Parties opposing a motion for summary disposition must present more than conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos,* 199 Mich App 482, 486; 502 NW2d 742 (1993). An unsupported allegation which amounts solely to conjecture is insufficient. *Pauley v Hall,* 124 Mich App 255, 263; 335 NW2d 197 (1983).

Applicable Law

Defendant maintains that because plaintiff's choice of expert relies on evidence that is inapplicable to the instant situation, he is precluded from testifying under MCL 600.2955(1) and MRE 702.

MRE 702 provides that if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The determination of whether a witness is an "expert" is within the discretion of the trial court. *Siirila v Barrios,* 398 Mich 576, 591; 248 NW2d 171 (1976). The fundamental inquiry for the trial court is whether permitting the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue, whether the opinion will confuse or mislead the trier of fact, and whether the facts and data upon which the expert bases the opinion are reliable. *Amorello v Monsanto Corp,* 186 Mich App 324; 463 NW2d 487 (1990). A proposed expert will not be scrutinized by an overly narrow test of his or her qualifications. *People v Christel,* 449 Mich 578, 592 n 25; 537 NW2d 194 (1995). An expert need not be a licensed professional. *Rickwalt v Richfield Lakes Corp,* 246 Mich App 450; 633 NW2d 418 (2001). Expert testimony must be directly related to, and within the immediate scope of, the witness' expertise. *Franzel v Kerr Manufacturing Co,* 234 Mich App 600; 600 NW2d 66 (1999).

Case law indicates that Michigan courts have allowed four bases for permitting experts to testify: (1) the expert may have personal knowledge of a disputed fact based upon the expert's own personal inspection and observation, and utilizing scientific or other principles, reach expert conclusions as to a fact in question, see *People v Griffin,* 235 Mich App 27; 597 NW2d 176 (1999); (2) an expert may testify to assist the trier of fact in understanding an issue in the case by explaining the standard of care or a scientific principle, see *Mazey v Adams,* 191 Mich App 328; 477 NW2d 698 (1991); (3) an expert can assist the trier of fact by testifying to his or her opinion on an issue in the case, applying expertise to facts in evidence, see *Attorney General v Ankersen,* 148 Mich App 524; 385 NW2d 658 (1986); and (4) expert testimony may be used to aid the jury in understanding the evidentiary backdrop of a case, in other words, to give a context to the substantive evidence in the case, see *People v Murray,* 234 Mich App 46; 593 NW2d 690 (1999).

Contrarily, MRE 702 also provides that if the trial court determines that proffered expert testimony would merely confuse the jury, or that any probative value is substantially outweighed by the potential for unfair prejudice or waste of time, it may preclude the testimony under MRE 403. *Carpenter v Consumers Power Co,* 230 Mich App 547; 584 NW2d 375 (1998), vacated on other grounds sub. nom. *Case v Consumers Power Co,* 463 Mich 1; 615 NW2d 17 (2000) (where expert testimony is purely speculative, "it should be excluded or stricken pursuant to MRE 403").

Discussion

Keeping those principles in mind as outlined above, the Court is not convinced by defendant's arguments, indeed, after reviewing documents submitted by plaintiff, the Court is inclined to admit the testimony of plaintiff's expert, as he is qualified to assist the trier of fact by applying his expertise to the facts in evidence, as well as giving an understanding of the substantive evidence in the case. Plaintiff's expert's CV indicates he is an expert in the field of playground equipment manufacture, and set-up safety guidelines. He has expert knowledge in this field, which he bases on extensive personal knowledge, education, studied accident data, anthropometric data of children, studies of how children play on playgrounds, as well as national standards set for the use of playground equipment wherever the public is involved – not just governmental agencies. Moreover, plaintiff's expert did not just rely on the rules set forth by ASTM and CPSC, but also those of other numerous groups, such as the National Program for Playground Safety (NPPS), the National Playground Safety Institute (NPSI), the National Recreation and Parks Association (NRPA), among others, all of which the expert witness claims have long established that ASTM and CPSC rules are applicable to the category that defendant falls into, that is, a multiple-family dwelling.

Plaintiff is not claiming a negligence per se claim, in other words, that defendant violated any statutory duty, rather, that defendant is liable under a common-law theory of negligence in its construction/maintenance of the playground. Defendant has admitted that prior to the erection of the equipment, he never consulted any kind of guideline manuals, so had no knowledge as to how to properly install the equipment within proper safety guidelines. As a premises owner and possessor, defendant had a duty to his invitees to ensure that the playground was reasonably safe for those utilizing it, and had a duty to anticipate what hazards could produce injury, and to eliminate them. He freely admits he did none of this.

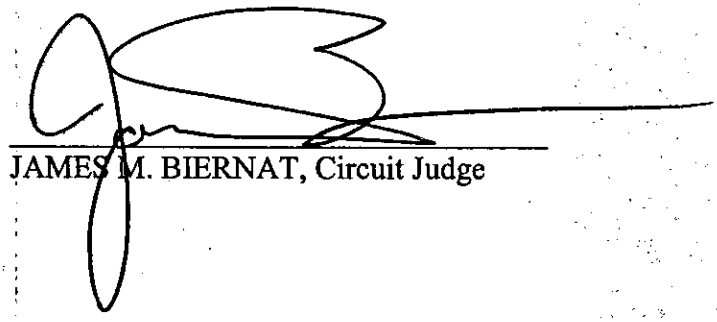
Whether a company acted negligently, although it complied with industry standards or customs, is determined by the trier of fact under proper instructions by the court. *Schultz v Consumers Power Co,* 443 Mich 445, 457; 506 NW2d 175 (1993). The corollary then to this in this case is whether defendant acted negligently in not complying with industry standards or customs, in not researching or educating himself or his staff on the proper standards, and as such, is a question of fact for the trier of fact.

Further, defendant's argument that plaintiff's expert relies on materials inapplicable to the instant case is disingenuous insofar as it ignores the expert's experience, knowledge, education and training in the field in which he seeks to testify. If the plaintiff can convince a jury that a reasonably prudent multi-family management team could have taken measures accepted as industry standards, and failed to do so, then the jury is clearly at liberty to find that defendant breached its duty by failing to take reasonable care to protect its invitees from unreasonable risks of harm. It stands to reason that in any context, whether when erecting a playground for the public within a multiple-family complex, or in one's own backyard, the

builder would seek out and adhere to safety guidelines for such activities with an eye to the safety of those youngsters utilizing the equipment.

For the above-stated reasons, defendant's motion in limine for summary disposition under MCR 2.116(C)(10) is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this case remains OPEN.

IT IS SO ORDERED.



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: May 30, 2006

cc: Michael T. McManus, Attorney at Law

Kenneth P. Williams, Attorney at Law